(3)

No. 91-802

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,

Respondent,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF QUESTIONS

In light of the decision of the Supreme Court in *William "Sky" King v. St. Vincent's Hospital,* No. 90-889 (December 16, 1991), SEPTA supplements the questions presented.

1. Whether 38 U.S.C. Section 2024(d), the Veterans Reemployment Rights Act, implicitly requires that an employee/reservist provide timely notice of military leave to a civilian employer.

2. Whether an employee/reservist provided timely notice to his civilian employer when the reservist provided only seven days notice of an additional 1½ months of military leave, immediately following over 6½ months of leave, if the employee knew the precise dates of the additional military leave months prior to notifying the employer and the employee admits to concealing this information from the employer.

3. Whether an employee/reservist had provided timely notice of future military leaves to his civilian employer where the reservist/employee admitted that his motivation for concealing timely notification to his employer of the leaves was to "play poker" with his employer and, therefore, bring his work related problems to a head.

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SUPPLEMENTAL STATEMENT OF THE CASE

SEPTA incorporates its original statement of the case, particularly pages 8-13 of its original Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

SEPTA incorporates Section D of its original Petition for Writ of Certiorari, particularly pages 26-27.

SEPTA makes the following additional arguments in support of its Petition for Writ of Certiorari in light this Court's

decision in *William "Sky" King v. St. Vincent's Hospital,* No. 90-889. In *"Sky" King v. St. Vincent's Hospital,* the Court did not address whether there is an implicit requirement that notice of military leave be timely provided to the civilian employer. The only issue before the Court in *William "Sky" King v. St. Vincent's Hospital,* No. 90-889, was whether or not there was an implicit statutory restriction on the length of leave that an employer/reservist may take in order to maintain a right to civilian re-employment. The Court's holding that there was no limitation on a reservist's leave does not preclude this Court from addressing the question of whether 38 U.S.C. Section 2024(d) modifies the traditional employer/employee relationship such that reservists may take military leave from a civilian employer without providing timely notice of that leave to the employer, particularly in peace time and for a voluntary project. Moreover, in the Petition for Writ of Certiorari in *"Sky" King,* the Solicitor General specifically stated that notice was not an issue for the Court.

In addition, the Court in *"Sky" King* was not required to address whether it is permissible for a reservist to utilize military leave to deliberately avoid his employment responsibilities in order to retaliate for work related problems. In *"Sky" King,* the Court was not required to address a reservist's bad faith in concealing the scheduling of military leaves and taking frequent leaves to deliberately absent himself from the work place.

ARGUMENT

Section 2024(d) was not enacted by Congress with the intent that a reservist have unbridled control over an employer. In *Monroe v. Standard Oil Co.,* 101 S. Ct. 2510 (1981), a reservist contended that his employer was obligated to make work-schedule accommodations to a reservist because of military leaves. The reservist contended that, due to weekend drills and two weeks at summer camp, he lost income when he was not able to change shifts and that the employer was obligated to award him lost wages when an accommodation could not be made. The Supreme Court rejected this position and held that

Congress did not intend employers to provide special benefits to reservists not made available to other employees. *Id.* at 2517. The Supreme Court reviewed the legislative history and found that reservists were entitled to "the same treatment offered their co-workers not having such military obligations . . . but not preferential treatment". S. Rep. No. 1477, 90th Cong., 2d. Sess. 2 (1968); H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966); 1968 House Hearings at 7471.

To permit the *Eidukonis* decision to stand would in essence permit preferential treatment. A reservist/employee would hold unbridled power over an employer based on his reserve obligations, an advantage not accorded to other employees. An employee could wait until the last moment to advise an employer of leaves, extend leaves without giving timely notice or simply take a leave to "punish" his employer. This could not have been the intent of Congress or the import of the holding in *"Sky" King.*

In cases under the predecessor to §2024(d), courts held that a reservist could not exercise unbridled control over his employer. In *Larsen v. Air California,* 313 F Supp. 218 (C.D. Cal. 1970), *affirmed,* 459 F.2d 52 (9th Cir. 1971), *cert. denied,* 409 U.S. 895 (1972), the court stated at page 220:

> Section 459 (g)(4) [the predecessor to §2024(d)] can hardly be interpreted as entitling one to a life-time job. The scheme of the Federal re-employment rights statute does not require a court to disregard these aspects of the basic employment relationship which would make continued or renewed employment unreasonable.

See also Lee v. The City of Pennsacola, 634 F. 2d 886 (5th Cir. 1986) (Congress in amending the act did not intend to endow a reservist with unreasonable power over his employer).

Even the Army Reserves acknowledges that notice to the employer should be made as soon as the possibility of a leave exists (*See Army Reserve Magazine,* Spring 1985, p. 29 ("give the boss plenty of advance notice"). The article noted that most problems were caused by reservists making it difficult for their

"bosses". For example, school employees who could train in the summer but made it difficult by voluntarily training during the school year.

Section 2024(d)speaks in terms of a "request" for leave. Implicit in the word "request" is that an employer receive adequate notice to act in response to the request. Although 38 U.S.C. §2024(d) does not specifically state how much notice is required, in general, courts have built in the concept of timely notice. *See, e.g., Lee v. City of Pennsacola, supra; Sawyer v. Swift & Co.,* 610 F. Supp. 38 (D. Kan. 1985). Eidukonis knew of the extension of his leave as early as December 1984 and knew about his two week annual training in October 1984. Nevertheless, he deliberately waited months to advise his employer. Eidukonis attempts to hide behind the fact that the "actual orders" were not yet received. Eidukonis ignores the fact that he had orders for his two week training in November 1984 and the extension of his leave by 26 days was a foregone conclusion in December, 1984. Eidukonis' actions violate the implicit notice requirements of §2024(d). This Court should clarify the issue of notice to prevent hardships to employers and to provide guidance to lower courts who will be confronted with the issue. *See, e.g, Blackmon v. Observer Transportation Co.,* 102 LC ¶11,451 (N.C. 1982) (employee did not provide sufficient notice in advance).

Moreover, *"Sky" King* did not illustrate the type of conduct demonstrated by Eidukonis. Eidukonis' conduct exemplifies bad faith actions and questionable motivation towards his employer in that Eidukonis was using military leave to punish SEPTA for failing to promote him. Therefore, it is necessary to grant certiorari to affirm that reservists have an obligation to deal fairly with their civilian employers and that notice must be timely.